

.FO 1

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 960 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE J.N.BHATT and
MR.JUSTICE A.K.TRIVEDI

=====

1. Whether Reporters of Local Papers may be allowed to see the judgements? - YES

JJJ

2. To be referred to the Reporter or not? - YES

[illegible]

3. Whether Their Lordships wish to see the fair copy
of the judgement? - NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? - NO

5. Whether it is to be circulated to the Civil Judge?
- NO

DILIP @ ALAMZEB SHANTILAL THAKKAR

Versus

STATE OF GUJARAT

Appearance:

MR PJ YAGNIK for Petitioner

MR KP RAWAL, ASSTT.PUBLIC PROSECUTOR for Respondents

CORAM : MR.JUSTICE J.N.BHATT and
MR.JUSTICE A.K.TRIVEDI

Date of decision: 14/08/98

JUDGEMENT

PER : A.K.TRIVEDI,J.

1. The appellant has filed the present appeal from jail to challenge the order of conviction and sentences passed by learned Asstt. Sessions Judge, Vadodara on 16-9-1992 in the proceedings of Sessions case No.59/92.

2. The appellant (hereinafter referred to as accused No.1 for short) along with one Hemantkumar Tribhuvandas Trivedi alias Indori (accused No.2) and Ajitbhai Gulamrasul Vohra - accused No.3 were charged in the Sessions case No.59/92 of Sessions Court, Vadodara for having committed offences made punishable under Section 392 read with Section 34 of IPC. The accused No.1 is also charged for having committed offences made punishable under Section 363, 366 and 376 of Indian Penal Code (for short "IPC"),. That the accused No.2 was further charged for having committed offences made punishable under Section 363, 366, 354 read with Section 34 of IPC. That vide impugned judgment and order, the accused No.1 is convicted for the offences made punishable under Section 376 of IPC and was ordered to suffer R.I. for 10 years and to pay fine of Rs.500/- in default further R.I. for 3 months. That the accused No.1 is also convicted for the offences made punishable under Section 392 read with Section 34 of IPC and was ordered to suffer R.I. for 3 months and to pay fine of Rs.50/- in default R.I.,. for 15 days. That substantive sentences were ordered to run concurrently. It may be noted that vide impugned judgment and order the accused No.2 was convicted for the offences made punishable under Section 376 read with Section 34 of IPC and was ordered to suffer sentence of R.I. for 2 years and to pay fine of Rs.200/- in default R.I. for 2 months. That the accused No.3 was convicted for the offences made punishable under Section 392 and was ordered to suffer sentence of R.I. for 3 months and to pay fine of Rs.50/- in default R.I. for 15 days.

3. That no appeal against the order of conviction and sentence has been preferred either by accused No.2 or accused No.3. That the accused No.1 is provided services of advocate Mr. P.J.Yagnik by way of legal aid.

4. That the profile of the prosecution case as apparent from the record could be set out as under :-

Teenagers Truptiben and Manish were the residents of same locality at Vadodara. That on account of friendship with the brother of Truptiben, Manish used to

visit the house of Trupti and as such developed intimacy. That both of them desired to enter into marriage. However, they were unable to disclose the said facts to their parents.

That on 19-1-89 Manish and Trupti left the parental home and proceeded to Haridwar by train on the apprehension that the parent of Trupti were desperately arranging for the marriage of with some other boy of their caste. That at Haridwar, and Manish performed ceremony of marriage before a priest by exchanging garlands and stayed there about 10 days. That on 30-1-1989 they returned to Vadodara by train around 5.00 P.M. in the evening. That they had decided to go to the house of Manish and pray for the blessings of their parents. However, they thought it wise to wait till the late night so as to avoid the confrontation by the curious neighbors and that thereby they visited a movie at Rajeshri cinema in the show of 6.00 P.M. to 9.00 P.M. and thereafter were sitting in front of milk bar in Kamatibaugh to pass the time. That the accused No.1 & 2 moved around Trupti and Manish at that time. That on finding strangers near them, Trupti and Manish got up and started towards the main gate of the garden. However, the accused No.1 & 2 intercepted them and made enquiries, posing themselves as police personnel. That they enquired about the name and status etc. of Manish and Trupti. In the mean while the accused No.3 also came there and told Manish that Manish has kidnapped a girl and a complaint is filed against him and told him that if they wanted to save themselves from the police case, they should pay Rs.1000/-. Manish having no extra money told them that he has only Rs.100/- with him. That the accused No.3 snatched away the amount of Rs.100/- from Manish and shared the amount with accused No.1 retaining Rs.50/- with him and went away. That thereafter the accused No.2 & 3 told Manish and Trupti that they are the persons of confidence of one Sodhasaheb, the police officer and that they would be able to settle the police case if Manish and Trupti would accompany them.

The accused No.1 & 2 took Manish and Trupti to village Por on the same night. That accused took them to a room of 'Dharmshala' (Inn) opposite temple of 'Baliabapji'. That the accused No.1 took Trupti to one side in the Dharmshala and told her that Manish has no money and he would not be able to save her. That he asked Trupti to enter into marriage with him. That on refusal by Trupti, accused No.1 was enraged and abused Trupti and thereafter told accused No.2 to hold Manish and forced Trupti to enter into the room. That the

accused No.1 & 2 threatened Trupti and Manish that if they would shout, Manish would be killed. That thereafter accused No.1 forcibly made Trupti to lie on the floor of the room and pulled down her trousers and undergarments. The accused No.1 undressed himself and thereafter forcibly committed sexual intercourse with Trupti against her will and without her consent. That thereafter accused No.1 dressed himself and came out of the room and told accused No.2 to commit rape on Trupti. In the mean time, Trupti had dressed herself and she had also come out. As the accused No.2 was approaching Trupti, she threatened them that she will shout for the help if accused No.2 misbehaved with her. That thereby accused No.1 & 2 went outside the room keeping Trupti and Manish alone there. That Trupti and Manish having found themselves at unknown place at the time of after midnight, were helpless and thereby they sat on the 'ota' outside room waiting for day light. That accused No.1 & 2 returned there around 4.30 A.M. in the morning and took them back to Vadodara by Rickshaw near Sayaji Garden. That on enquiry as there was no facility of public toilet for taking bath, accused asked Manish and Trupti to accompany him and took them along with accused No.2 to the residence of his brother in Buddhadev Colony. That brother of accused No.1 in Buddhadev Colony refused permission to enter into the house and told the accused No.1 that he has been in habit of bringing girls and that he would not permit him to enter into the house. That thereby all of them went back and arrived near Urkarsh Petrol Pump, from where at the instance of accused No.1, Manish telephoned to his maternal uncle who told them to wait there. That after some time the maternal uncle of Manish came there. That the accused No.1 and 2 told them that they should go to Karelibaug Police Station at around 11.00 A.M. That maternal uncle of Manish took Manish and Trupti to his house at Gotri vilage, where Trupti took bath, cleaned herself and thereafter in the company of Manish and his uncle went to Kareli baug police station, where Manish surrendered himself. That Trupti gave complaint against the accused whereby an offence was registered and transferred to Sayajigunj Police Station, for investigation of the offences alleged against the accused No.1, 2 & 3 in the complaint of Trupti who were arrested and produced before Chief Judicial Magistrate, Vadodara along with chargesheet.

5. That the accused pleaded 'Not-guilty' to the charges framed by the trial court and claimed to be tried. That all the accused have raised the defence of 'total denial' at trial. That on completion of trial, the trial court vide judgment and order dated 16-9-92

convicted and sentenced the accused as stated hereinabove which is challenged by accused No.1 in the present appeal.

6. The prosecution has produced documentary evidence and Mudamal collected during the investigation and to substantiate the charge had examined the following witnesses:

PW-1 Uday Purandar Ex.30 -Medical Officer

PW-2 Uttambhai Bhaggbhai Ex.17 -Dy.Mamalatdar who
held T.I.P. of
Accused.

PW-3 Keshavbhai Kashibhai Ex.19 - Panch(Hostile)

PW-4 Prakashbhai Jadavji Ex.21 - Panch

PW-5 Ramanbhai Mithabhai Ex.23 - Panch

PW-6 Pankaj Rameshbhai Ex.25 - Panch

PW-7 Manish Ex.26 - Victim boy

PW-8 Trupti Bansilal Soni Ex.28 - Complainant
Victim girl

PW-9 Kirtikumar M. Joshi Ex.33 - PSI - I.O.

PW-10 Ramesh Sharma Ex.34 - PSI - I.O.

- That the panch - case of identification parade is produced vide Ex.18 and the medical certificate of complainant Trupti and accused No.1 are produced vide Ex.14 & 15 respectively and report of Forensic Science Laboratory at Ex.36.

7. It has been contended on behalf of appellant/accused no. 1; that, in the absence of any marks of violence on the body of complainant (PW 8) and accused no.1; as per medical certificates Exh.14 and 15; respectively; the trial Court; ought not to have relied

on the sole testimony of complainant without any corroboration; to convict the accused no.1; for such a serious offence. That to support the contention reliance is also placed on the observations made by this Court vide para 6 of the judgment rendered in the matter of State of Gujarat vs. Mahamad @ Manno Usmanbhai Chauhan, reported vide 1996 GLR (37-2) page 821 and in para 9 of the judgment rendered in the matter of Mohanlal Marwadi vs. State of Gujarat, reported vide page 200 of the same volume.

8. As against that ld. APP Shri K.P. Raval countered the submissions urged on behalf of appellant by relying on the deposition of PW 7 and PW 8 and relevant part of the impugned judgment of the trial Court. That to counter the contention the ld. APP; has relied on the observations made by the Supreme Court in the matter of Harpal Singh vs. State of Himachal Pradesh, reported vide AIR 1981 SC 361 and followed by Bombay High Court in the matter of State of Maharashtra vs. Savala Sagu Kokare and anr., reported vide 1997 Cri.L.J. 786.

9. We have carefully construed the depositions of complainant Trupti (PW 8) Exh.27 and of Manish (PW 7) Exh.26; in the context of facts and circumstances apparent from the record and in our considered view the submissions urged on behalf of appellant, could hardly be merited for more than one reasons. It is true that; the medical certificates Exh.14 and 15 of complainant girl Trupti and accused no.2 respectively do not disclose the fact of any external injury on the body and particularly on the private parts of either of the complainant or the accused no.1. That the FSL report Exh.36 disclose the facts that stains of human semen were found on the under garments of complainant as well as of accused no.1; but the groupings of said semen could not be determined. Thus the medical evidence produced on record is of no assistance to test the veracity of the version deposed by complainant Exh.27 (PW 8) and the defence raised by the accused no.1. However, the medical evidence is ultimately, merely a corroborative piece of evidence. That by way of ordinary prudence the Court may insist upon the medical evidence to convict the accused of sexual offence. But it is not a hard and fast rule to accept the version deposed by the prosecutrix. That even in the absence of medical evidence; if the evidence of prosecutrix is found to be otherwise dependable; the conviction could be founded on the sole testimony of the prosecutrix (Para 9.1 of 37(2) GLR 200). It may also be noted that; in the matter of Harpal Singh vs. State of H.P. (AIR 1981 SC 361) the Apex Court has held that the

absence of injury on the private parts of the prosecutrix should not rule out her being subjected to rape. That the said proposition of law is also followed by the High Court of Bombay in the matter of State of Maharashtra vs. Savala Sagu Kokare and anr. (1997 Cri. L.J. 786). That in the instant case, the trial Court has rightly followed the dictum of Apex Court stated in the matter of State of Maharashtra vs. C.K. Jain (1990) 1 SCC 550; while appreciating the evidence of PW 8; the prosecutrix. That the Apex Court has observed vide para 16 of the said matter as under;

"..... Ordinarily the evidence of prosecutrix must carry the same weight as is attached to an injured person, who is a victim of violence; unless there are special circumstances; which call for greater caution, in which case, it would be safe to act on her testimony; if there is independent evidence lending assurance to her accusations....."

Furthermore; the Apex Court has also observed in the above stated matter that; evidence of prosecutrix should be judged in the back-drop of the particular fact-situation in which, she was placed. That absence of resistance by the prosecutrix is required to be viewed in the context of the sense of awe attached to the authority and her helplessness. Generally, an Indian woman would not make false allegations of rape against any person, so as to attach stigma to her character and disrepute to her family.

10. That in the instant case; the accused no.1 and 2 have had posed themselves as police personnel and had demoralized the complainant Trupti (PW 8) and Manish (PW 7) under the threat of police case filed against Manish by the father of Trupti. That the accused no. 1 and 2 had used deceitful means to tempt Manish and Trupti to accompany them from Kamatibag garden, Vadodara to Por village at the place of incident. That PW 7- Manish and PW 8 - Trupti; were not only eager to avoid the arrest of Manish in the said police case; but they were anxious to see that said police case is settled as suggested by accused no.1 and 2; in their mis-representation. Under such circumstances it was quite natural and probable for Manish and Trupti to accompany the accused no.1 and 2 to the scene of offence without any protest or raising alarm. That PW 8 Trupti in her deposition Exh.27; has given graphic description of the incident. That the version deposed by her is consistent with the FIR Exh.25; which was lodged by her at the earliest opportunity.

That at test identification parade held by PW 2 - as per Exh.17 and panchnama Exh.18; the accused no.1 and 2 are identified by PW 7 Manish and PW 8 Trupti. That during cross-examination of PW 8 Trupti; nothing adverse is revealed except minor contradictions and insignificant discrepancies. Thus the evidence of prosecutrix Exh.29 is clear; cogent and convincing. It is corroborated by evidence of PW 7 Manish Exh.26 and various incriminating circumstances apparent from the proved facts on record. That in the absence of proved motive or enmity against the accused no.1 and 2 to implicate them falsely, we do not find any reason to disbelieve the same. In our considered opinion, the trial Court has rightly come to the conclusion on appreciation of evidence placed on record by the prosecution that accused no.1 is guilty for the offences made punishable under Sec.376 as well as Sec.392 r/w 34 of the IPC.

11. That as regards the order of sentence; in the facts and circumstances of the present case; we do not find that the sentence imposed on accused no.1; is unjust - improper or excessive. Before recording conclusion it is necessary to note that; the accused no.1; was also charged for having committed offences made punishable u/s 363/366 r/w 34 of the IPC. That while recording findings on the charge; the trial Court has observed vide para 37 that; no offence against accused no.1 and 2 u/s 363/366 has been established by the prosecution and as such the finding of point no.2 is given in negative. That while passing final orders the trial Court has omitted to state any thing regarding said charge u/s 363/366 r/w 34 of the IPC. That while giving negative finding of point no.2; the trial Court has assigned the reasons that prosecution has failed to produce cogent evidence regarding age of the prosecutrix Trupti. That in the facts and circumstances of the present case; said finding cannot be said to be just - proper or legal. That the provisions of Sec.366 IPC; prescribe punishment for the offence which includes kidnapping as well as abduction of any woman and as such the age of the prosecutrix has no significance in establishing the offence. That in the facts and circumstances of the present case, the trial Court should have given the positive finding to point no.2 and should have recorded the conviction u/s 366 r/w 34 of the IPC of accused no.1 and 2 while passing the final order u/s 235(1) of Cr.P.C. 1973. It may be noted that; after the charge is framed, the accused has to be found guilty or not guilty of the charge; otherwise, it would amount to error of law as held by High Court of Delhi in the matter of Prakash Chander vs. State; reported vide 1995 Cri. L.J. (Vol.1) page 368, para 29.

That the trial Court having sentenced accused no.1 for R.I. of ten years in respect to conviction u/s 376 IPC; no miscarriage of justice has occurred. That in the absence of any acquittal appeal on the said point; this Court cannot rectify the said error in the present proceedings; and hence nothing is required to be done.

12. In view of aforesaid discussions; we hold that present appeal being meritless; deserves rejection and accordingly stands disposed of as dismissed.
